Office-Supreme Court, U. S.
FILED
JUN 30 1950
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 165

DEAUVILLE ASSOCIATES, INC.,

Petitioner,

vs.

JOHN M. MURRELL AND D. H. REDFEARN, AS RECEIVERS OF DEAUVILLE CORPORATION,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

HAROLD LEVENTHAL,
914 Ring Building,
Washington, D. C.

SAMUEL J. KARNER,
213 Shoreland Building,
Miami, Florida.

SAMUEL H. RUBIN,
2315 Cadillac Tower,
Detroit, Michigan.

Attorneys for Petitioner.

INDEX

Subject Index

	Page
Petition for writ of certiorari	1
Opinions below	1
Jurisdiction	2
Questions presented	2
Rule involved	2
Statement	2
Specification of errors to be urged	8
Reasons for granting the writ	9
Conclusion	16
Appendix—Rule 24 of the Rules of Civil Procedure	17
Opinion of Court of Appeals in *Eristavi-Tchitcherine* v. *Lasser*	18

Table of Cases Cited

Aspen Min. & Smelting Co. v. *Billings*, 150 U. S. 131	3
Cincinnati, Ind. and W. R. Co. v. *Indianapolis Union Ry. Co.*, 270 U. S. 107	13
Eristavi-Tchitcherine v. *Lasser*, 164 F. 2d 144	3, 4
Hamilton-Brown Shoe Co. v. *Wolf Bros. & Co.*, 240 U. S. 251	15
John Simmons Co. v. *Grier Bros. Co.*, 258 U. S. 82	15
Leary v. *United States*, 224 U. S. 567	12, 14
Pyle-National Co. v. *Amos*, 172 F. 2d 425	11, 14
Rogers v. *Hill*, 289 U. S. 582	15
Wolpe v. *Poretsky*, 144 F. 2d 505	9

Statute Cited

28 U. S. C. 1254	2

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 165

DEAUVILLE ASSOCIATES, INC.,
Petitioner,

vs.

JOHN M. MURRELL AND D. H. REDFEARN, AS RECEIVERS OF DEAUVILLE CORPORATION,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable, the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit in the above entitled case.

Opinions Below

The opinion of the Court of Appeals (R. 133) is reported in 180 F. 2d 275. The District Court entered judgment without rendering an opinion (R. 81, 82).

Jurisdiction

The Court of Appeals for the Fifth Circuit filed its opinion on February 27, 1950 (R. 133). A petition for rehearing, filed March 20, 1950 (R. 139), was denied on April 5, 1950 (R. 151). The jurisdiction of this Court is invoked under 28 U. S. C. 1254.

Questions Presented

1. Where the circuit court of appeals reversed the district court for erroneously denying leave to intervene on an application filed pursuant to Rule 24(a) of the Federal Rules of Civil Procedure, setting forth that the representation of applicant's interest is inadequate and that applicant is or may be bound by a judgment in the action, is the intervenor disabled from contesting decrees entered by the district court on the merits subsequent to erroneous denial of leave to intervene and prior to the date of the reversal of that error by the appellate court; and may the intervenor thus be denied any day in court with respect to such decrees?

2. Whether there is a requisite showing of separable controversy against citizens of different states sufficient to support removal of this case to the district court.[1]

Rule Involved

Rule 24 of the Federal Rules of Civil Procedure is set forth in the Appendix.

Statement

This litigation was begun by a complaint filed by Lucy Eristavi-Tchitcherine in a Florida state court against J. A.

[1] This question would probably not of itself warrant certiorari. If certiorari is granted, petitioner will present the question as one of Federal jurisdiction which the Court could consider upon its own motion.

Lasser, B. A. Winkel, and others. The suit was removed to the District Court for the Southern District of Florida, and there numbered No. 1148, or No. 1148-M-Civil.

Petitioner, Deauville Associates, Inc., has sought to intervene in this proceeding as the successor in interest of original defendants and cross-claimants J. A. Lasser and B. A. Winkel.

The circuit court of appeals referred to the previous opinions and records for the earlier phases of the litigation (see *Aspen Min. & Smelting Co.* v. *Billings,* 150 U. S. 131). Its principal previous opinions are: (a) its opinion in No. 11978, filed November 7, 1947, reversing a judgment on the pleadings in favor of cross-claimants Lasser and Winkel, and remanding for trial, *Eristavi-Tchitcherine* et al. v. *Lasser* et al., 164 F. 2d 144; reprinted for convenience in the Appendix; and (b) its opinion in No. 12436, filed April 4, 1949, the previous opinion with respect to intervention by petitioner, 173 F. 2d 745, which appears at R. 146.

The court decided No. 12436 upon the basis of the record printed for No. 11978 and the record printed for No. 12436, (all the district court proceedings being under Number 1148-M-Civil). Certified copies of these printed records, duly certified by the Clerk of the Circuit Court of Appeals, have been filed with the Clerk of the United States Supreme Court.

The facts of this litigation may be stated as follows:

Plaintiff, Lucy Eristavi-Tchitcherine, a Florida resident, brought suit against W. M. F. Magraw, and Ivy Blount, citizens of Florida, J. A. Lasser, and B. A. Winkel, the Deauville Corporation, and others, alleging, insofar as now material, that she was the principal stockholder of the Deauville Corporation; that on May 15, 1944, Deauville Corporation entered into an agreement with defendants Lasser and Winkel for the sale of certain property (the Mac-

Fadden-Deauville Hotel) to them for $750,000, that thereafter this sale was changed to a stock deal whereby Lasser and Winkel became the owners of 51 percent of the stock of Deauville Corporation. The complaint sought recission of the stock deal for fraud. Subsequently an amended complaint, and a second amended complaint (which joined Magraw and Blount as parties plaintiff) were filed.

Lasser and Winkel filed an answer and cross-complaint, denying all charges of fraud, but nevertheless offering to rescind the stock deal and surrender their ownership of 51% of the stock, praying, however, for specific performance of their sales agreement with Deauville Corporation.

On March 26 and April 24, 1947, the district judge filed opinion orders for judgment on the pleadings, determining that the stock ownership of Lasser and Winkel be canceled (in accordance with plaintiff's request and the conditional acquiescence of Lasser and Winkel) but determining that regardless of fraud in regard to the stock deal, Lasser and Winkel had a valid purchase contract with Deauville Corporation for the purchase of the hotel, and were entitled to specific performance.

In an opinion filed November 7, 1947, the circuit court of appeals reversed, holding that defendants were not entitled to a judgment of specific performance on the pleadings, that proof of fraud as alleged by plaintiff might—but would not necessarily—lead to a decree refusing specific performance as a matter of discretion, and that the case should have been tried out for the purpose of determining whether, first, defendants have a valid contract of purchase, and second whether equity will grant specific performance or leave them to their remedies at law against the Deauville Corporation. 164 F. 2d 144; reprinted in Appendix.

Petitioner, Deauville Associates Inc., filed a petition for intervention in the proceeding on January 16, 1948 and a

supplemental petition for intervention on February 13, 1948 (R. 26, 74).[2] Petitioner alleged that for substantial sums of money as consideration, Lasser and Winkel assigned to petitioner all their interest in the controversy, including all their right, title and interest in and to the purchase agreement of May 8, 1944 with Deauville Corporation, specific performance of which is being sought in this proceeding; that Lasser and Winkel first held part of the stock in petitioner corporation but no longer hold any such stock; that petitioner believes that Winkel and Lasser are conspiring to defraud petitioner of its interest; and that representation of petitioner's interest by Winkel and Lasser is inadequate, that petitioner may be bound by any judgment and that petitioner's interest in the disposition of the property involved, in the custody of court receivers of Deauville Corporation, appointed January 15, 1948, may be affected.

The district court denied intervention on the ground that the defendants Lasser and Winkel had acted in violation of an injunction by purporting to transfer stock certificates in Deauville Corporation[3] and that petitioner's principal stockholder either knew or was chargeable with knowledge of this injunction. This ground was subsequently rejected by the circuit court of appeals as reason for denying inter-

---

[2] These petitions referred back to allegations in a petition for intervention filed on May 8, 1947, but the earlier petition was no longer pending when the two subsequent petitions were filed.

These petitions are set forth in printed Record No. 12436 at R. 417 (May 8, 1947); R. 2 (Jan. 16, 1948); R. 8 (Feb. 13, 1948). That record also contains the orders of the District Judge denying leave to intervene, April 1, 1948 (R. 408), and denying a stay order or supersedeas bond, April 8, 1948 (R. 412).

[3] The opinion order is set forth in Record No. 12436, p. 408.

The injunction appears at p. 69 of Record in No. 11978. It was obtained from the state judge upon exhibiting the complaint and in advance of answer. It enjoined the defendants from transferring their stock interest, but did not enjoin in any way assignment of rights under the purchase agreement.

vention. In any event, it had no application whatever to the assignment by defendants to petitioner of all their right and interest in and to their prior purchase agreement of May 15, 1944, which was not in violation of any order.

On April 1, 1948, the district judge denied petitioner's application to intervene. On April 8, 1948, the court ordered that since petitioner is not a party it would not grant a stay order or fix a supersedeas bond. Petitioner sought a writ of mandamus from the circuit court of appeals but on April 16, 1948, that court refused mandamus to set aside an appealable order without prejudice to consideration of all questions upon an appeal (R. 138, 148).

Petitioner thereupon appealed to the circuit court of appeals which on April 4, 1949 reversed the ruling of the district judge. Its per curiam opinion stated that whether or not defendants violated an injunction in transferring their interests, that should not necessarily deprive the purchaser of whatever right, title or interest it may have acquired in such a sale, and should certainly not close the doors of the court to the purchaser in defense of its property. The court stated that petitioner clearly comes within the purview of Rule 24(a) of the Rules of Civil Procedure, that it alleges that it has succeeded to the interest of Lasser and Winkel and that it has no representation of its interests, and that under these allegations it is entitled to its day in court. It reversed and remanded with instructions to permit petitioner to intervene as of this date (R. 146-148).

On June 22, 1949, respondents as receivers of Deauville Corporation, filed a petition requesting to reoffer the hotel property for sale (R. 65). On June 27, 1949, petitioner filed in one pleading both an answer objecting to that petition for authority to sell, and a cross-petition (R. 72-79).

This cross-petition renewed the allegations of a petition filed on May 31, 1949, to set aside the orders thereto-

fore entered in this cause (R. 25): petitioner averred that its rights under its petitions for intervention filed January 16, 1948 and February 13, 1948, remained undetermined; that on December 10, 1948, the District Court had entered a decree in the cause; and that by its purported decrees the District Court had disposed of and is attempting to dispose of property rightfully belonging to this cross-petitioner as assignee of the defendants Lasser and Winkel without the cross-petitioner having had its day in court, although its petitions for intervention were on file. (R. 73-78.)

It may be noted that the judgment adverse to defendants Lasser and Winkel entered December 10, 1948, canceled their stock interest in Deauville Corporation and declared their agreement of May 15, 1944, with Deauville Corporation, to be of no force and effect whatever. The decree also provided for fees of $100,000 for attorney's fees for services rendered by attorneys Charles Danton, and D. H. Redfearn and R. H. Ferrell to Deauville Corporation, and additional fees for services rendered by said attorneys to defendants Lasser and Winkel (R. 76). This decree was appealed by Winkel and Lasser's administratrix but the appeal was dismissed on motion of appellees and without objection, for want of prosecution (R. 137).[4]

The intervenor's cross-petition also attacked certain orders relating to the receivership and counsel fees, and denied the existence of diversity citizenship requisite to federal jurisdiction, and accordingly prayed that all orders theretofore entered be vacated and the cause remanded to the state court (R. 78).

Respondents filed on June 28, 1949 a motion to strike the cross-petition upon the ground of lack of interest in petitioner, as established by the decree of December 10, 1948,

---

[4] A certified copy of this decree, referred to in the opinion below (R. 137), has been filed with the Clerk of the Supreme Court.

adverse to Lasser and Winkel, and averring that petitioner had no right to relitigate matters decided by the decree of December 10, 1948 (R. 79-81).

On the same day, June 28, 1949, the District Court ordered that this intervenor's cross-petition be stricken and denied (R. 81), and further ordered that the receivers be directed to sell the hotel property (R. 82).

The Circuit Court of Appeals affirmed, in an opinion stating that petitioner did not have an absolute right of intervention under Rule 24(a), that the previous ruling of the circuit court of appeals permitted petitioner to intervene as of the date of the ruling and that petitioner cannot question rulings made prior to April 4, 1949. It also held that the issue of federal jurisdiction was *res judicata* and on the merits that there was federal jurisdiction based on diversity of citizenship and a separable controversy (R. 134-137).

Specification of Errors to Be Urged

The Court of Appeals for the Fifth Circuit erred:

1. In holding that petitioner was disabled from attacking any orders or decrees entered prior to April 4, 1949.

2. In failing to hold that petitioner is entitled to its day in court and to move to vacate decrees made by the District Court subsequent to the date of the intervention application filed on January 16 and February 13, 1948, including particularly the decree of December 10, 1948, adverse to the original defendants Lasser and Winkel who had previously assigned their entire interest to petitioner.

3. In ruling on April 4, 1949, that under the allegations in the intervention applications, that petitioner has succeeded to the interest of defendants Lasser and Winkel and that it has no representation of that interest, peti-

tioner is within the purview of Rule 24(a) and is entitled to day in court, and in then applying that ruling so as to deny petitioner any day in court on, or any leave to file, a petition to vacate orders entered between the date of the application for intervention and April 4, 1949.

4. In ruling that the original complaint by plaintiff, a citizen of Florida, presented a separable controversy solely against citizens of other states, which supported removal from the State to the Federal courts.

5. In ruling that the existence of Federal jurisdiction is *res judicata* by virtue of prior adjudications.

6. In affirming the judgments of the District Court ordering that the cross-petition filed by petitioner be stricken and denied, and ordering respondents to sell the hotel property of the corporation.

Reasons for Granting the Writ

1. The court below has rendered a decision, on an important question of Federal law, in conflict with the decision of the Court of Appeals for the District of Columbia in *Wolpe* v. *Poretsky*, 144 F. 2d 505, certiorari denied, 323 U. S. 777.

The question is this: An application for intervention is filed pursuant to Rule 24(a) of the Federal Rules of Civil Procedure, setting forth that applicant has an interest in a pending controversy, that the representation of applicant's interest in the controversy is inadequate and the applicant is or may be bound by a judgment in the action. Although Rule 24(a) grants intervention as of right, the District Judge erroneously denies leave to intervene. Upon appeal, the Circuit Court of Appeals reverses the refusal to grant leave to intervene. Is the applicant (a) permitted to exercise the rights a party might exercise at the time the petition

for intervention was filed, or (b) disabled from contesting or attacking all orders or decrees entered prior to the date the appellate court reversed the denial of leave to intervene.

The court below held as per (b). On February 13, 1948, petitioner filed its supplemental application to intervene, alleging that it held by assignment all the rights of original defendants Lasser and Winkel, whose answer alleged they were rightfully entitled to the majority stock interest in Deauville Corporation, and whose cross-complaint sought specific performance of their agreement to purchase a hotel from Deauville Corporation for $750,000. Petitioner's application to intervene under Rule 24(a) set forth the inadequacy of their representation of the interest which they had assigned to petitioner for a valuable consideration. On April 1, 1948, the District Court erroneously denied leave to intervene, and that order was reversed by the Circuit Court of Appeals on April 4, 1949. But intervenor's efforts to protect its rights as asserted in the intervention petition—and specifically to contest the decree of December 10, 1948, entered against original defendants and cross-complainants on the merits without giving petitioner a day in court—were rejected below on the ground that petitioner cannot attack any order entered prior to April 4, 1949.

In *Wolpe* v. *Poretsky,* the court held as per (a)—that the intervenor may exercise all the rights of a party as of the time of filing the petition for intervention. In that case a land-owner brought a suit to enjoin enforcement of a zoning order and obtained an injunction. After the zoning commission decided not to appeal an adjoining land-owner sought leave to intervene. Leave to intervene was denied by the District Court. The Court of Appeals reversed on the ground that intervention should have been granted as a matter of right under Rule 24(a), and that even if this

were a case of permissive intervention denial was an abuse of discretion.

The court then held that reversal of the erroneous denial of leave to intervene carries with it preservation of intervenor's rights or claims *as of the date of filing the petition for intervention.* See 144 F. (2d) at 508:

> "When they filed their petition for intervention appellants had all the rights of a party *at that stage of the proceedings.* This, of course, includes the right of appeal. Since the time for appeal had not expired when appellants sought to intervene they should be made parties with the right to appeal and all other rights a party might exercise *at the time their intervention was filed* (Emphasis added).

The decision below is also in conflict with *Pyle-National Co.* v. *Amos,* 172 F. 2d 425, decided by the Circuit Court of Appeals for the Seventh Circuit, although the *ratio decidendi* is not as clearly spelled out in the *Amos* case. A corporation brought suit against three officers for approximately $700,000, for misappropriation of funds. A stockholder notified the corporation he would intervene if four directors were not joined as defendants. On February 17, 1948, the stockholder learning that a settlement was to be consummated in District Court at 2 p. m. that day, filed a petition to intervene a few minutes before 2 o'clock. The District Court denied the petition to intervene, and then entered a court judgment against defendants for approximately $350,000.

The Circuit Court of Appeals held: (1) In view of the charges of wrongdoing against the corporation's directors, the stockholder should have been permitted to intervene under Rule 24(a). (2) But he cannot take an appeal from the judgment on the merits. (3) However, the order denying leave to intervene is reversed and remanded with instructions to permit the stockholder to intervene, and to

file a petition embodying the purposes of his original petition:

> "• • • and which may at the same time and in the same proceeding challenge the integrity of the consent judgment of February 17th, 1948 in favor of plaintiff and against defendants" (172 F. 2d at 429).

2. This is not merely a case involving one of the new Rules of Civil Procedure. A rudimentary principle of justice is at stake,—that a man should have his day in court. In *Leary* v. *United States,* 224 U. S. 567, this Court reversed the refusal to grant leave to intervene. In that case, as in the case at bar, intervenor's claim to property was based on an assignment by defendant for a consideration, and intervenor had previously permitted defendant to carry on the litigation. Intervenor now claimed that representation by defendant would be inadequate. Justice Holmes put it quite simply, that intervenor "fairly may ask a chance to protect herself." (p. 576.)

Indeed in the present case the intervention application was made in advance of trial, while in the *Leary* case this Court permitted intervention after all the evidence had been taken, and further permitted intervenor to recall and cross-examine witnesses who had already been called by the plaintiff. See 224 U. S. at 576.

Certainly it would be unjust to prevent intervenor from questioning decrees filed subsequent to the filing of the petition for intervention where, as here, petitioner was immobilized by the error of the District Judge in refusing leave to intervene. Lasser and Winkel were still parties defendant, but they no longer had any real interest in the case, having assigned to petitioner all their rights under the sales agreement and in the litigation. The intervention application also contained allegations fearing fraud and conspiracy on their part adverse to the interests of

petitioner. In due course they even failed to prosecute the appeal from the final decree.

Immediately after the District Court's denial of intervention petitioner twice sought to minimize the consequence of the District Court's error: However, the District Judge refused a stay and supersedeas bond, on the ground that petitioner was not a party; and petitioner's application to the Circuit Court of Appeals for mandamus was rejected on the ground that the order was appealable. It is unfortunate that appellate correction of error below requires time for appeal. But either respondents must now litigate with petitioner the questions petitioner never had an opportunity to litigate, or else petitioner will never have had its day in court. The consequences of the District Court's error should be borne by the parties who wrongfully opposed the intervention, and not by petitioner who was erroneously denied leave to intervene.

3. It was noted below that petitioner did not apply to this Court for certiorari to review the ruling of April 4, 1949. That ruling was a two-page opinion which triumphantly vindicated petitioner's position that it was entitled to intervene under Rule 24(a), and which concluded that petitioner "is entitled under those allegations to its day in court" (R. 149). The brief closing phrase permitting intervention "as of this date" was in no way discussed or explained. It was not then established that this opinion in support of intervenor's day in court would be applied so as to make that day in court meaningless.

Reference should be made in this connection to decisions holding that even an intervenor first coming into a case may in appropriate cases examine orders entered prior to the date of intervention (*Cincinnati, Ind. and W. R. Co.* v. *Indianapolis Union Ry. Co.*, 270 U. S. 107, 115), or recall witnesses for cross-examination though the hearing has

already been completed (*Leary* v. *United States*, 224 U. S. 567). Certainly where an appellate court directs intervenor to come into court anew, after ruling that there was error in refusing the original petition for intervention, the cases indicate that the new pleading of intervenor may attack rulings made subsequent to the original application to intervene. *Pyle-National Co.* v. *Amos*, 172 F. 2d 425 (C. C. A. 7th). The opinion of April 4, 1949, was certainly not such a clear-cut holding to the contrary as to impel or even justify applying for certiorari at that time,—in advance of decrees implementing the appellate ruling so as to deny petitioner its day in court.

The Court's opinion of April 4, 1949, was somewhat unclear but its present reading of its opinion is truly puzzling. The previous opinion was squarely bottomed upon Rule 24(a)—which expressly accords an absolute right of intervention—yet the court below now believes petitioner's right is not absolute. A phrase in the earlier opinion—that petitioner is entitled to the fruits of the suit that would otherwise have been awarded to Lasser and Winkel—seems in that opinion to be a reason why petitioner is protected by Rule 24(a); but it is now twisted into a limitation of petitioner's rights as an intervenor. The limitation on petitioner's rights is now stated to be justified by the fact that petitioner is an assignee. That seems immaterial under *Leary* v. *United States*, 224 U. S. 567. But in any event there is not a single word in the earlier opinion even suggesting the idea that an assignee has less rights under Rule 24(a) than anyone else, or that an assignee is rightfully left to inadequate representation of its status as real party in interest so far as the trial on the merits is concerned.

On the contrary, the entire thrust of the earlier opinion was the insistence that the assignee is entitled to inter-

vene even though the assignor acted in violation of a court injunction in making the assignment. And even that problem had application only to the defendants' purported transfer of a stock interest, and not to their transfer of rights in the agreement to purchase the hotel.

In short, there was ample scope in the previous opinion of April 4, 1949, for an application which would grant rather than deny applicant a real "day in court." The court below erred in giving it a contrary application.

In any event there is no doubt that the ruling of the court below is fully reviewable by this Court. Even where the Circuit Court of Appeals has previously ruled against a party on the merits, and subsequently applies its earlier decision as "the law of the case," the Supreme Court is free to rectify an error made in the previous opinion by the Circuit Court of Appeals. *John Simmons Co.* v. *Grier Bros. Co.*, 258 U. S. 82; *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U. S. 251, 258; *Rogers* v. *Hill*, 289 U. S. 582, 586-588.

Conclusion

The court below has decided an important question of Federal law in such a way as to deny petitioner a day in court on the merits of the case. It has rendered a decision in conflict with the decision of another circuit court of appeals on the same question under the Federal Rules of Civil Procedure. The decision conflicts in principle with applicable decisions of this Court prior to the adoption of the Rules of Civil Procedure, and the question arising under the Rules is one which should be settled by this Court. Accordingly this petition for a writ of certiorari should be granted.

Respectfully submitted,

HAROLD LEVENTHAL,
914 Ring Building,
Washington 6, D. C.

SAMUEL J. KANNER,
213 Shoreland Building,
Miami, Florida.

SAMUEL H. RUBIN,
2315 Cadillac Tower,
Detroit, Michigan.

Attorneys for Petitioner.

June 30, 1950.

APPENDIX

Rule 24 of the Federal Rules of Civil Procedure provides:

Intervention

(a) *Intervention of Right.* Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; or (3) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property which is [5] in the custody or subject to the control or disposition [5] of the court or an officer thereof.

(b) *Permissive Intervention.* Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action.[5] In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

---

[5] The words "which is" and "or subject to the control or disposition" in (a), and the second sentence in (b), were added by amendment effective March 19, 1948.

Published in 164 F. 2d 144

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 11978

LUCY ERISTAVI-TCHITCHERINE, WILLIAM M. F. MAGRAW, and IVY T. BLOUNT, as Trustee, *Appellants*,

versus

J. A. LASSER, B. A. WINKEL, and THE NEW DEAUVILLE, *Appellees*

Appeal from the District Court of the United States for the Southern District of Florida

(November 7, 1947)

Before Sibley, Hutcheson, and Holmes, Circuit Judges

HUTCHESON, *Circuit Judge:*

Appealing from a judgment rendered April 24, 1947, for specific performance granted on the pleadings,[1] appel-

[1] This long drawn out pleading controversy running through 233 printed pages was begun by the filing on April 24, 1945, of a bill of complaint against the appellees, narrating the transactions and dealings which appellant Tchitcherine, as the owner of substantially all the stock of the Deauville Corp., had had with appellees, and characterizing them as attended on defendants' part with fraud and wrong doing.

These included the execution of a sales contract between Deauville Corp., as seller, and Winkel and Lasser, as buyers, the later "abandonment of the sale of said property and the merger" of all of the agreements for its sale, and all transactions connected with them, into a stock deal by which the defendants Lasser and Winkel became the owners of 51 percent of the capital stock of the corporation.

There was an offer to do equity and a prayer for "rescission of all transactions and dealings" between plaintiff and defendant.

On June 8, 1945, an amended complaint was filed, followed on September 24, 1946, by a second amended complaint in which the other appellants, Wm. M. F. Magraw and Ivy Blount, as trustee, joined with the original plaintiff. This complaint, going in much greater detail into the transactions and occurrences with which the original complaint dealt, charging that the conduct of the defendants had been characterized by fraud and overreaching and misdealing throughout, and offering to do

lants are here insisting that the case was not one for determination on the pleadings but for trial on the merits and that, upon proof of the facts the pleadings put in issue, specific performance ought to, and would, have been denied.

On November 25, 1946, plaintiffs moved for an order on the pleadings which would require the defendants to assign and transfer to the plaintiff Tchitcherine all of their right to the 51 shares of stock and would reserve for consideration and judgment all issues of law and fact raised on the cross-complaint for specific performance.

On January 16, 1947, defendants moved for judgment in their favor on the pleadings, and on January 21st, they amended their cross-complaint to pray that the court enter an order rescinding and cancelling the stock deal and enforcing the sales contract.

On March 26, and April 24, 1947, the district judge filed what he designated as opinion orders in which he analyzed the pleadings and reached the conclusion that as to the validity and enforcibility of the sales contract, as distinguished from the stock deal, no issue of fact was made, determined that the stock ownership should be cancelled and the sales contract be specifically enforced, and ordered that by May 9, 1947, the defendants do certain acts with reference to the stock, and the Deauville Corporation execute and deliver a warranty deed to the property in suit. It was further ordered that on said day a master would be appointed to state and settle the accounts between plain-

---

equity, sought an examination of all the facts connected with the stock deal and its rescission and cancellation for fraud.

On November 4, 1946, the defendants filed their answer and their cross-complaint for specific performance of the Deauville Corp. sales contract. In these pleadings they denied all charges of fraud and overreaching and, offering to surrender their ownership of 51 percent of the capital stock of the corporation, they urged that the sales contract be specifically enforced.

On November 25, 1946, plaintiffs filed their answer to the cross-complaint. In it they denied that the sales contract was a valid one, realleged all the matters set out in their second amended complaint and alleged that the contract was void for want of mutuality and that, because of the fraudulent acts and conduct of defendants set out in the answer and in their former pleadings in connection with the subject matter of the sales contract and the subsequent stock deal, the order ought not to be enforced.

tiffs and defendants arising out of and connected with their dealings and transactions, said accounting to include the issues of fraud tendered as to this stock deal.

We cannot agree with the district judge that the matter of the stock deal and the sales contract and the dealings of the defendants with which the pleadings deal can be separated into such water tight compartments as to authorize a decree of specific performance without a hearing on the whole case and a determination on the facts as developed on the trial as to whether in justice and equity defendants are entitled to such a decree. Specific performance is not grantable as a matter of right, but only as a matter of equity, and in the exercise of a sound and informed discretion upon a knowledge of the whole facts. Wherever, therefore, the truth of the matters bruited may lie, whether there is a real fire beneath, and accounting for, the smoke of the accusations is not a matter which ought to, or may be, determined on pleadings and without a trial of the facts. Without then determining whether the specific performance defendants prayed for should or should not be ordered upon the whole facts, we think it quite clear that it ought not to have been ordered on the pleadings but that the case should have been tried out upon all the matters tendered, for the purpose of determining whether, first, defendants have a valid contract of purchase, and, second, if they have, whether equity will specifically enforce it or leave defendants to their remedies at law.

The district judge, in turning his decision as he did, upon the established principle that the "clean hands" maxim [2] is not intended to, and does not, operate punitively, and that its applicability depends upon the connection between the complainants' iniquitous acts and the defendants' conduct, which the complainants rely upon as establishing their cause of action, looked too closely on the limitations, not closely enough on the scope, of the maxim. But more than that, he seemed to overlook the fact that the remedy of specific performance which defendants sought, is not accorded as a matter of right to every suitor but only upon

[2] 19 Am. Jur., "Equity," Secs. 469, 473-4-5.

equitable considerations [3] to those who can make out an equitable case for it. It is not meant by this to say that if plaintiffs prove what they have alleged, the court must deny specific performance. It is meant only to say that defendants are not entitled to a decree for specific performance on the pleadings. Whether the case is one for specific performance must wait upon a hearing and determination as to the facts and the decision by the chancellor upon them in the exercise of a sound and informed discretion.

The judgment is REVERSED and the cause is REMANDED for further and not inconsistent proceedings.

---

[3] 49 Am. Jur. "Specific Performance," Secs. 6 to 9, incl.; CF. *Goudeau* v. *Daigle*, 124 F. (2) 656; *General American Life Ins. Co.* v. *Natchitoches Oil Mill, Inc.*, 160 F. (2) 140.